SUPREME COURT, U. S.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-485

IN THE MATTER OF
LESLIE STEVEN KOVATS, Bankrupt,
Petitioner,

vs.

FIRST NATIONAL BANK OF BROKEN ARROW,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

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TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

First National Bank of Broken Arrow, Respondent herein, opposes the Petition for Writ of Certiorari to the United States Court of Appeals, Tenth Circuit, filed by Leslie Steven Kovats. The reasons for this opposition are hereinafter set forth. Respondent contends the opinion of the Court of Appeals, Tenth Circuit, contained in Appendix A to the Petition is a correct decision which raises no considerations described in Rule 19 of this Court, which raises no issue of law of public importance and in fact raises no issue properly reviewable by Writ of Certiorari. The con-

siderations described by Petitioner involve only questions of fact and sufficiency thereof and no issue or question of law is involved. For these reasons and those stated below, the Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

The complete facts are these:

It is undisputed that Leslie Steven Kovats, Petitioner herein, executed a promissory note in writing to the Bank bearing a date of October 15, 1970 in the amount of $20,000.00, for a term of six (6) months. In connection with the execution of the note and the loan from the Bank, the Petitioner also tendered the Bank a financial statement in writing, signed by the Bankrupt, which the evidence indisputably revealed overstated the Petitioner's net worth by approximately $59,000.00 with the result that the Petitioner's true net worth was less than the amount of money which he was seeking to borrow from the Bank. The Petitioner admitted he omitted those liabilities on purpose and did not intend to disclose their existence. There was a conflict in the evidence as to whether that financial statement was in fact given on October 15, 1970 or whether it was delivered to the Bank a few days thereafter.

Subsequently, the loan was renewed for a 30 day period and thereafter was renewed for an additional six (6) months by the Bank as evidenced by a new note signed by the Petitioner. At the time the loan was renewed, an inquiry was made of the Petitioner concerning his financial condition and he assured the Bank that the financial statement previously given still reflected his true financial condition. In extending or renewing the loan to the Petitioner on May 19, 1971, the Bank relied solely upon that financial statement in determining the Petitioner's financial condi-

tion, and the testimony was undisputed that the Bank had no other information concerning the Petitioner's alleged financial position.

In connection with the original loan and the renewals thereof, the Bank also obtained, as additional collateral, the guaranty of Braden Industries, Inc. of Broken Arrow, Oklahoma, the employer of Petitioner. (Kovats was financial Vice-President of Braden and had extensive experience in corporate financial affairs.) However, the testimony revealed that at the time the loan was renewed in May, 1971, the Bank was aware, as was the Petitioner, that his position with Braden was precarious. The President of the Bank testified that he was relying solely upon the Petitioner to repay the loan although he admitted that he would not have made the loan without the Braden guaranty as additional collateral. He also testified that he would not have made the loan, even with the Braden guaranty, had he known the true financial condition of the Petitioner.

At the conclusion of the testimony, the Referee made certain findings of fact and conclusions of law including a finding that the Petitioner uttered a false financial statement understating his liabilities in the amount of approximately $59,000.00 with the intention of concealing the existence of such liabilities. The Referee declined to resolve the conflict as to whether the financial statement was originally tendered the Bank on October 15, 1970, the date the loan was originally funded, or whether it was delivered later as claimed by the Petitioner. He found it unnecessary to resolve that conflict since the record was clear that the Petitioner knew or should have known that the financial statement and its import of significance in transactions he might

have with the Bank subsequent to the delivery thereof and that the Bank would be thereby deceived as to his net worth and liabilities. The Referee further found that the renewal of the loan on May 19, 1971 was induced by the guaranty of Braden Industries as well as the apparent financial condition of the Petitioner and his net worth as reflected on the financial statement furnished in October, 1970. The Referee found that it was not possible to measure the relative significance of the Braden guaranty and the financial statement in inducing the loan, but the Referee found that each was significant and taken together induced the renewal of the loan in May, 1971. He further found it was not necessary that the financial statement uttered by the Petitioner be the sole inducement for the granting of renewal of the credit. Thereupon, the Referee concluded the debt owed by the Petitioner to the Bank was non-dischargeable under Section 17 a (2) of the Bankruptcy Act and entered judgment thereon.

Kovats then petitioned the United States District Court under a Petition for Review requesting that the Referee's findings and conclusions be reviewed by the District Court assigning among certain specified grounds of error that the Referee's findings were "clearly erroneous" and not sustained by the evidence. The District Court found that the Referee's findings and conclusions were "clearly erroneous" and held the debt to be discharged. However, the District Court did not hear any additional evidence or testimony but made its determination solely from the record and upon arguments of counsel.

In reversing the District Court, the United States Court of Appeals, Tenth Circuit, found the District Court erred in at least two ways:

1. The District Court re-tried the case de novo and did not confine its inquiry as an appellate tribunal required by General Order 47.
2. The evidence did not require the Referee to resolve the conflict as to when the financial statement was actually delivered to the Bank. The Bank had only one financial statement of the Petitioner when the Bank extended or renewed the loan and under Section 17(a) the debt was nondischargeable.

ARGUMENT

REASONS WHY THE WRIT SHOULD NOT ISSUE

As this Court has numerously stated, certiorari should not be granted except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties and in cases where there is a real and embarrassing conflict of opinion and authority between the Courts of Appeal. E.g., *Layne & Bowler Corporation* v. *Western Well Works*, 261 U.S. 387 (1923).

THE PETITION FAILS TO STATE CONSIDERATIONS SET FORTH IN RULE 19

Rule 19 of this Court, while not fully measuring the Court's discretion, sets forth the character of the reasons which will be considered in a review on Writ of Certiorari. Additionally, the Rule re-emphasizes that certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor. It is submitted that Kovat's Petition does not set forth any of the enumerated reasons and most certainly does not raise any principle of importance to the public nor any special and important reason.

This is not a case involving a state court decision of a federal question and hence, this ground is unavailable to seek certiorari. Nor is this a situation where a Court of Appeals has decided an important state question in conflict with applicable state law, nor a case involving an important question of federal law which has not been, but should be settled by this Court. Also, this is not a situation where a lower Court has decided a federal question in conflict with the decisions of this Court or has so far departed from the accepted and usual course of judicial proceedings. In short, nothing has been raised by Petitioner sufficient to invoke this Court's supervisory powers.

There is no conflict between decisions of the Courts of Appeal. In fact, the instant case is in accord with for the prior decisions of the Courts of Appeals, Tenth Circuit, Ninth Circuit and the Second Circuit. See *Clancy* v. *First National Bank of Colorado*, 408 F.2d 899 (10th Cir. 1969) cert. den. 396 U.S. 958; *Wylie* v. *Ward*, 292 F.2d 500 (9th Cir. 1961); *Lloyd* v. *Industrial Bank*, 241 F.2d 924 (2nd Cir. 1957).

The Tenth Circuit totally rejected the argument made by Petitioner that it was necessary for the Referee to determine when the financial statement was given with respect to the original loan. The Court accurately noted that such argument flies in the face of the undisputed facts and the law. Section 17 (a) of the Bankruptcy Act, the Court noted, creates a bar to dischargeability if there is:

> "...'an extension or *renewal of credit* in reliance upon a materially false statement in writing respecting his financial condition' [Emphasis Added]" (See Appendix A p. A5, Petition for Writ of Certiorari.)

The Court held total reliance upon the statement is not required; the statement need only be a substantial factor in bringing about the extension of credit. The record in this case clearly revealed that the false financial statement given by Kovats was the only written financial information in the Bank's possession when the loan was renewed and Kovats knew the Bank was going to rely upon the statement when the loan was to be renewed. This, the Tenth Circuit concluded, satisfies the requirements of Section 17 (a) of the Bankruptcy Act.

It is an inescapable conclusion that one who utters an intentionally false financial statement must be deemed to have uttered it with the intent to deceive. The Court of Appeals agreed with the Referee that Kovats knew or should have known that the Bank was going to rely upon the statement in any renewals of the loan. The transcript of the testimony supports such a finding. One must be presumed to have intended the necessary consequences of his own voluntary acts. Where a false statement in its nature calculated to defraud is made with knowledge of its falsity, intent will be inferred. See *Beneficial Finance Company of Charleston* v. *Collins*, 149 S.E.2d 221 (W. Va. 1966).

It is ridiculous to say that Kovats lacked an intent to deceive the Bank. If, as he contended, the loan had been made prior to tendering the financial statement why would he bother to make a false statement? He already had the money. It is obvious however, that if a true statement had been rendered the loan would not have been renewed at the end of the six month term. This Kovats knew or should have known. His own testimony supported a finding that he expected to renew the loan upon expiration of the original six month term. Intent is a question of fact, not a question of law. The Tenth Circuit found:

> "After reviewing the record on appeal, we find there is *substantial evidence* to support the Referee's findings of an intent by Kovats to deceive, and reliance by the Bank on the false financial statement when renewing the loan in question". [Emphasis supplied].

This substantial evidence alleviated the need to resolve the conflict as contended by Petitioner.

The fourth question presented for review is a smokescreen. Assuming arguendo that the Court of Appeals (and the Referee) adopted a standard of proof contrary to one adopted by the Supreme Court of Oklahoma, nevertheless such is not a basis for certiorari, let alone for an appeal. A bankruptcy court or other federal court does not necessarily apply the law the state where it sets but applies the Bankruptcy Act as interpreted by authoritative federal decisions in determining questions of dischargeability. See CJS Federal Courts 169 (b). *In re Chicago Rapid Transit Co.*, 129 F.2d 1 (7th Cir. 1942).

ADDITIONAL SUPPORT FOR TENTH CIRCUIT DECISION

In addition to reversing the District Court on the grounds stated above, the Tenth Circuit reversed upon the additional ground that the District Court failed to function in an appellate posture, as required by General Order in Bankruptcy 47. The Court correctly held that in applying this General Order the District Court's function is not to decide factual issues de novo. See *Zenith Radio Corp.* v. *Hazeltine Research, Inc.* 395 U.S. 100 (1969). Rather the Court noted, the District Court must review the findings and conclusions giving deference to the trier of fact who is in a superior position to weigh the

evidence. The Court then stated such rule is especially true in the instant case where the District Court did not take further testimony but only heard arguments of counsel. Cf. *Washington* v. *Houston Lumber Co.*, 310 F.2d 881 (10th Cir. 1962); *Dailey* v. *City of Lawton, Oklahoma*, 425 F.2d 1037 (10th Cir. 1970).

THE TENTH CIRCUIT OPINION RAISES NO ISSUES OF PUBLIC IMPORTANCE

The opinion of the Court of Appeals is well founded upon prior case law both in that Circuit and other Circuits. The case was apparently not regarded by that Court as establishing new precedent since that Court ordered the opinion not be published. The case involves a clear application of facts to established principles of law. No new precedent was established; rather the Court of Appeals reversed the District Court on two distinct grounds, both of which involved questions of fact. Rule 19 addresses itself to questions of law rather than questions of fact. Rather than urge to this Court any of the considerations recognized as a grounds for a Writ of Certiorari Petitioner has attempted again to appeal that the lower Court erred.

In summary, the Petitioner has failed to raise any issue or principle of importance to the public. He is seeking only to overturn a personal money judgment which has correctly been entered against him. No special or important reasons have been urged by Petitioner for

the review he is requesting. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney of record for the Respondent here, First National Bank of Broken Arrow, hereby certifies that on the 12th day of October, 1973, in compliance with Rule 33(1) of the Rules of the Supreme Court of the United States, three copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari were deposited in the United States Post Office at Tulsa, Oklahoma, with first class postage prepaid, addressed to the following counsel of record at his Post Office address as shown:

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